Husin bin Sitorus v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–164 OF 2009
RAMLY ALI, AZHAR MA'AH AND SYED AHMAD HELMY JJCA
30 JANUARY 2012

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 143,915g of cannabis — Convicted and sentenced to death — Appeal against — Custody and control of drugs — Statutory presumption of knowledge and trafficking — Trial judge relied on statutory presumption of custody and control with necessary mens rea although factual matrix of prosecution case did not establish a prima facie case against appellant — Whether trial judge committed error — Whether prosecution established exclusivity of custody and control of drugs by appellant — Dangerous Drugs Act 1952 s 37(d)

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Evidence — Adverse inference — Failure of prosecution to call material witnesses — Whether adverse inference could be invoked against prosecution — Whether failure to call these witnesses or offering them to defence caused grave injustice to appellant — Evidence Act 1950 s 114(g)

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The appellant was convicted and sentenced to death on a charge of trafficking in 143,915g of cannabis. The facts of the prosecution's case were that SP3, from the Malaysia Marine Police had stopped the boat which was in the Malaysian waters off Port Klang. SP4 and his officers, who boarded the said boat for an inspection, went into the wheelhouse of the boat and saw that the appellant was manning the wheel of the boat and at the same time, he said that he saw three men sleeping. Inside the cargo hatch of the boat, the police party found eight gunny sacks which contained packages of slabs of dried leaves suspected to be cannabis. The suspected drugs were seized and a few documents were also seized from the appellant. The three men were charged under the immigration law for being in Malaysian territory without any valid travelling documents. The three men had since pleaded guilty and they had served their time in jail for those immigration offences. In his defence, the appellant had testified inter alia, that he was requested by Ahmad Tengkis to transport a cargo of Indomie to Klang. The appellant however, denied any knowledge of the drugs inside the eight gunny sacks. Further, the appellant stated that at the time the boat was stopped by the Malaysian Marine Police, Asar Nawi was the captain of the boat. The trial judge held, inter alia, that appellant had failed to rebut the presumption of possession on the balance of probabilities with regard to the impugned drugs. Before this court, the appellant submitted that the trial judge in his decision had committed an error when he invoked s 37(d) of the DDA

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A 1952 and ruled that the appellant had custody and control of the drugs in question after making an initial finding that the prosecution had failed to establish at a prima facie level that appellant had possession with the necessary mens rea over the impugned drugs.

B **Held**, allowing the appeal:

(1) Before invoking the presumption under s 37(d), the vital question for the court to determine is whether the prosecution has made out a prima facie case of possession of the drugs in question as understood in criminal law. Possession here means having custody and control combined with evidential or criminal proof of actual knowledge or circumstances clearly and irresistibly pointing to knowledge of the drugs. Possession through having control and custody in order to incriminate a person, must be such that the possessor must know the nature of the thing possessed. Having exclusive custody and control implies and involves having knowledge both of the drugs and the nature thereof. For the purpose of criminal liability, without exclusive custody and control of the drugs, the mere fact that the accused had knowledge thereof is insufficient to incriminate (see paras 12–13).

(2) The eight gunny sacks were found in the cargo hatch, which in all likelihood was located somewhere away from the wheelhouse. There seemed to be no evidence from the prosecution to suggest that the cargo hatch was under lock and key, not accessible to anyone else except the appellant. From the nature of the evidence led, the prosecution had failed to make out a prima facie case of exclusive custody and/or control of the eight gunny sacks containing the drugs in question, against the appellant (see paras 14 & 17).

(3) Although the three men were asleep at the time when SP3 and SP4 boarded the boat, surely they would be able to throw some light as to what had transpired and took place or what they had observed before starting their journey at Batu Bara. Logically, these three men could not be sleeping throughout their 17 hours journey to Port Klang. They should be able to tell the court about what had taken place during the early part of their journey. The failure of the prosecution to call these witnesses or at the very least offering them to the defence has caused grave injustice to the appellant. It is trite law that where circumstantial evidence points to two or more inferences, it should be resolved by exercising the more favourable inference to the accused (see paras 21–22).

[Bahasa Malaysia summary

Perayu didapati bersalah dan dihukum mati atas tuduhan mengedar 143.915g kanabis. Fakta-fakta kes pendakwaan bahawa SP3, dari Polis Marin Malaysia

telah memberhentikan bot yang berada di perairan Malaysia di Pelabuhan Klang. SP4 dan pegawai-pegawainya, yang menaiki kapal tersebut untuk pemeriksaan, masuk ke dalam rumah kemudi bot tersebut dan melihat bahawa perayu sedang mengendalikan roda bot dan pada masa yang sama, dia berkata bahawa dia melihat tiga orang lelaki sedang tidur. Di dalam *hatch* kargo bot tersebut, pihak polis menemui lapan guni yang mengandungi bungkusan kepingan daun-daun kering disyaki sebagai kanabis. Dadah-dadah yang disyaki tersebut dirampas dan beberapa dokumen juga dirampas daripada perayu. Ketiga-tiga orang lelaki tersebut telah didakwa di bawah undang-undang imigresen kerana berada dalam kawasan Malaysia tanpa sebarang dokumen perjalanan yang sah. Ketiga-tiga mereka mengaku bersalah dan telah menjalani masa mereka di penjara bagi kesalahan-kesalahan imigresen tersebut. Dalam pembelaannya, perayu telah memberi keterangan, antara lain, bahawa dia telah diminta oleh Ahmad Tengkis untuk mengangkut sebuah kargo yang mengandungi Indomie ke Klang. Perayu walau bagaimanapun, menafikan sebarang pengetahuan mengenai dadah di dalam lapan guni tersebut. Seterusnya, perayu menyatakan bahawa pada yang masa bot tersebut telah ditahan oleh Polis Marin Malaysia, Asar Nawi merupakan kapten bot. Hakim bicara memutuskan, antara lain, bahawa perayu telah gagal untuk menangkis anggapan milikan di atas imbangan kebarangkalian mengenai dadah-dadah berkenaan. Di hadapan mahkamah ini, perayu menghujahkan bahawa hakim bicara dalam keputusannya telah terkhilaf apabila dia membangkitkan s 37(d) Akta Dadah Berbahaya 1952 dan memutuskan bahawa perayu mempunyai jagaan dan kawalan ke atas dadah-dadah berkenaan selepas membuat dapatan awal bahawa pihak pendakwaan telah gagal untuk mebuktikan di peringkat prima facie bahawa perayu mempunyai milikan dengan mens rea yang sepatutnya ke atas dadah-dadah yang dipertikaikan.

Diputuskan, membenarkan rayuan:

(1) Sebelum membangkitkan anggapan di bawah s 37(d), soalan penting bagi mahkamah untuk menentukan sama ada pihak pendakwa telah membuktikan kes prima facie pemilikan dadah berkenaan seperti yang difahami dalam undang-undang jenayah. Pemilikan dalam kes ini bermaksud mempunyai jagaan dan kawalan yang digabungkan dengan bukti-bukti jenayah atau pengetahuan atau keadaan sebenar dengan jelas dan menunjukkan pengetahuan dadah. Pemilikan melalui kawalan dan jagaan untuk menunjukkan kesalahan seseorang, mestilah dalam keadaan di mana pemiliknya mesti tahu sifat barang yang dalam jagaannya. Mempunyai jagaan dan kawalan eksklusif membayangkan dan melibatkan adanya pengetahuan megenai kedua-dua dadah dan sifatnya. Bagi tujuan liabiliti jenayah, tanpa jagaan dan kawalan eksklusif

dadah-dadah, fakta semata-mata bahawa tertuduh mempunyai pengetahuan tidak mencukupi untuk menunjukkan salah (lihat perenggan 12–13).

(2) Lapan guni ditemui dalam *hatch* kargo, yang kemungkinan semuanya terletak di suatu tempat yang jauh dari rumah kemudi. Ia seolah-seolah tiada bukti daripada pihak pendakwaan untuk mencadangkan bahawa hatch kargo di tempat berkunci, tidak boleh diakses oleh orang lain kecuali perayu. Daripada sifat bukti yang dikemukakan, pihak pendakwaan telah gagal untuk mewujudkan kes prima facie jagaan eksklusif dan/atau kawalan ke atas lapan guni yang mengandungi dadah berkenaan, terhadap perayu (lihat perenggan 14 & 17).

(3) Walaupun ketiga-tiga orang lelaki tersebut sedang tidur ketika SP3 dan SP4 menaiki bot, mereka sudah tentu dapat memberi sedikit pendedahan seperti apa yang telah berlaku dan terjadi atau apa yang mereka telah diperhatikan sebelum memulakan perjalanan mereka di Batu Bara. Secara logiknya, ketiga-tiga lelaki tersebut tentu tidak boleh tidur sepanjang 17 jam perjalanan mereka ke Pelabuhan Klang. Mereka seharusnya boleh memberitahu mahkamah mengenai apa yang telah berlaku pada awal perjalanan mereka. Kegagalan pihak pendakwaan untuk memanggil saksi-saksi ini atau sekurang-kurangnya menawarkan kepada pembelaan telah menyebabkan ketidakadilan kepada perayu. Ia adalah undang-undang tetap bahawa apabila keterangan mengikut keadaan membawa kepada dua atau lebih kesimpulan, ia perlu diselesaikan dengan menjalankan inferens yang lebih memihak kepada tertuduh (lihat perenggan 21–22).]

Notes

For cases on s 39B(1)(a), see *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)

Choo Chang Teik & Anor v PP [1991] 3 MLJ 423, SC (refd)

Choo Yoke Choy v PP [1992] 2 MLJ 632, SC (refd)

Pendakwa Raya v Kang Ho Soh [1992] 1 MLJ 360; [1991] 3 CLJ 2914, HC (refd)

Phoon Liat Sum v PP [1950] MLJ 205 (refd)

PP v Basri bin Salihin [1994] 2 MLJ 476, HC (refd)

PP v Tang Chew Weng [1969] 2 MLJ 17 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(d)

Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45–181 of 2005 (High Court, Shah Alam)

Sebastian Cha (Rosli Kamaruddin with him)(Sebastian Cha & Co) for the appellant.

Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death on a charge of trafficking in 143,915g of cannabis. The charge reads:

> Bahawa kamu pada 22 Oktober 2004, lebih kurang 3.00 pagi, di perairan Selat Klang Setatan di kedudukan LAT 02 57.15'N, LONG 101 18.5'E, jarak 0.2 batu nautika dari Pelabuhan Barat dan 0.28 batu nautika dari Pulau Che Mat Zin, Pandamaran, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya iaitu 143,915 gram Cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

On appeal, we allowed the appeal, quashed the conviction and set aside the sentence. We now give our reasons for doing so.

[2] For originality, we set out herein below the facts of the prosecution's case as they are narrated by the trial judge as found in his grounds of judgment. The facts read:

> On the 22 October 2004, at about 2.30am ASP Khairuddin bin Jamal (SP3) was on patrol duty in the Malaysian waters off Port Klang, Selangor when he noted on the radar screen on his patrol craft, a boat heading towards Port Klang without any light emanating therefrom.
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> SP3 kept on tracking the said boat and when it was about ten meters from the said boat, he had identified himself as the Malaysia Marine Police and had given it an order to stop. The said boat stopped and SP3 then directed Chief Inspector Mohd Rudzuan bin Ahmad ('SP4') and his officers to board the said boat for an inspection. Having boarded the said boat SP4 and his officers went into the wheelhouse ('the 'rumah kemudi") of the boat and saw there was an man manning the wheel of the boat and at the same time, he said that he saw three men were sleeping therein. Those three men had to be awoken from their slumber. The man at the wheel of the boat and the three men were ordered to go to the deck of the boat while the raiding party did an inspection on the boat. After a while, the police party found something suspicious inside the cargo hatch of the boat. SP3 was duly alerted about this fact and upon inspection it was found that there were eight gunny sacks had contained packages of slabs of dried leaves suspected to be cannabis. The suspected drugs were seized and a few documents were also seized from the man who was seen having helmed the boat earlier. That man was the OKT in this case, whereas the other three

men were charged under the immigration law for being in Malaysian territory without any valid travel documents. The three men had since pleaded guilty and they had served their time in jail for those immigration offences.

[3] Based on the above facts, the learned trial judge ordered the appellant to enter his defence.

THE DEFENCE

[4] The learned trial judge in his grounds of judgment set out that the appellant's defence in the following style:

> Essentially, the defence put forth by the OKT could be described as one of denial of any knowledge of the drugs inside the eight gunny sacks which were found inside the cargo hatch of the boat that he was seen captaining, an act that he had also denied in the course of his evidence. It is abundantly clear that the bulk of the evidence of the OKT had been focused on what had allegedly happened at Batu Bara in Sumatra, Indonesia immediately before the boat set sail to Klang in Malaysia. In essence, the OKT had testified that he was requested by one man by the name of Ahmad Tengkis to transport, for him to Klang in Malaysia, a carge of Indomie and together with two Achinese men.
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> According to him, the boat was not his but that it had belonged to one of Ahmad Tengkis's men. According to him further, the boat needed some repair before it could set sail to Klang. He said that he was paid a fee for his effort whereby he was to deliver the instant mee Indomie to one by the name of Wondar by calling him upon arrival in Klang. After the boat was repaired, the OKT set sail to sea and was headed towards Klang in the early hours of the morning with the instant mee cargo and the two Achinese men. However, after sailing for about 15 minutes or so, the OKT said that he was contacted by Ahmad Tengkis who asked him to stop and to wait for him because he wanted to put on board more cargo and that one man by the name of Asar Nawi would be joining him on the trip to Klang. According to the OKT, when the cargo was being loaded onto the boat, he was in the wheelhouse and that he did not see what the cargo was. However, when he asked Asar Nawi about it, he was told that the cargo had been daily provisions. It was also the OKT's evidence that he was told by Ahmad Tengkis that Asar Nawi could help the OKT to helm the boat if that was necessary. When everything was ready they then set sail to Klang. The trip was a long one and it had taken the boat about 18 hours to reach the Klang waters. There the OKT said that he had contacted Wondar about his cargo and the three Achinese men. Wondar asked him to wait for him which the OKT told this court he had obliged. But after waiting for about ten minutes, and seeing that Wondar did not come despite having promised earlier to meet up, the OKT said that he decided to sail back to Sumatra. In so doing, he had asked Asar Nawi to man the boat as he ('the OKT') was feeling tired having been behind the wheel of the boat for the entire journey from Batu Bara to Klang. According to the OKT, it was during this trip back to Sumatra that they were stopped by the Malaysian Marine Police patrol boat and that his boat was subsequently inspected. It was also his evidence that his boat was still in the Malaysian waters when it was stopped by the Malaysian

Marine patrol boat. So according to the OKT, at the time when the boat was stopped, it was Asar Nawi who was the captain of the boat That in essence, would materially describe the version of the events according to the OKT prior to his arrest together with the three men and the impugned cargo.

[5] Apart from the appellant's own evidence as above defence also called a legal officer from Batu Bara in Sumatra by the name of Zulhendri ('SD2'), Pegawai Pemerintah Indonesia, attached to Majlis Perbandaran/Daerah Batu Bara, di Bahagian Hukum, for the sole purpose of tendering two affidavits deposed by Ahmad Tengkis and Ibid Kopi who could not come to testify in support of the appellant's defence due to financial constraints. The two affidavits were admitted in evidence and marked as D28 and D29. This witness in his evidence tendered an affidavit D28 which he claimed to have been deposed by one Ahmad Tengkis. The said affidavit reads as follows:

Saya, *AHMAD (AHMAD TINGKIS)* No KTP (Kartu Tanda Penduduk: 1.05164/2019/11/AS/2005) seorang warga Negara Indonesia yang cukup umur dan yang beralamat di Desa Bogak, Kecamatan Tanjung Tiram, Kode Pos 21253, Kabupaten Batu Bara, Propinsi Sumatera Utara, dengan ini sesungguhnya berikrar dan menyatakan seperti berikut:

(1) Saya adalah seorang wiraswasta.

(2) Segala fakta-fakta yang dideposkan di sini adalah dalam pengetahuan saya sendiri dan adalah benar menurut maklumat dan kepercayaan saya.

(3) Saya adalah orang yang disuruh oleh SIDIN (Suku Aceh) untuk mencari pengemudi bot.

(4) Selanjutnya saya menemui HUSIN SITORUS yang menurut sepengetahuan saya bahawa HUSIN SITORUS bisa mengemudikan bot dan mempertemukannya dengan SIDIN di Kedai Kopi Batu Bara.

(5) Kemudian di Kedai Kopi tersebut SIDIN menawarkan pada HUSIN SITORUS untuk mengemudikan bot dan tangkahan Kecamatan Tanjung Tiram Kabupaten Batu Bara sampai ke Pelabuhan Port Klang Malaysia dengan muatan indomie sekaligus membawa 2 (dua) orang laki-laki Suku Aceh warga negara Indonesia, apabila sampai di Malaysia segera menghubungi WONDAR seorang warga negara Indonesia yang tinggal di Malaysia. SIDIN juga menjanjikan sebuah handphone dan uang senilai Rp1,200.000 (Satu Juta Dua Ratus Ribu Rupiah).

(6) HUSIN SITORUS menerima tawaran dan SIDIN kemudian saya dan HUSIN SITORUS pergi melihat bot yang telah disewa oleh SAFRI (IPIT KOPI) atas suruhan SYAIFUL pergi melihat bot yang telah disewa oleh SAFRI (IPIT KOPI) atas suruhan SYAIFUL yang kebetulan SYAIFUL adalah anak buah SIDIN. Kebetulan bot yang mau dibawa ke Malaysia perlu perbaikan maka harus naik dock.

(7) Hari keberangkatan ditentukan pada hari Kamis, Oktober 2004 oleh HUSIN SITORUS.

A (8) Kamis pagi pada saat sebelum berangkat saya menjumpai HUSIN SITORUS bahwasanya ada 2 (dua) orang laki-laki yang sama sekali tidak saya kenal, mereka berbicara dalam bahasa Aceh. Kebetulan 2 (dua) orang laik-laki tersebut titipan SIDIN yang akan ikut serta ke Malaysia bersama HUSIN SITORUS. SIDIN mengatakan kepada saya bahawa nama mereka adalah ARMIA HUSSEN dan HASSAN BIN ABU BAKAR kemudian setelah mereka bersiap-siap akhirnya mereka berangkat meninggalkan tangkahan Kecamatan Tanjung Tiram Kabupaten Batu Bara menuju Pelabuhan Port Klang Malaysia.

(9) Kemudian saya kembali pulang, tidak berapa lama SIDIN menelpon saya agar segera ketemu. Setelah ketemu, SIDIN menyuruh saya bersama seorang laki-laki yang tidak saya kenal bernama ASAR NAWI untuk dihantarkan ikut bersama HUSIN SITORUS menuju Malaysia dengan menggunakan bot lain yang telah disediakan oleh SIDIN. SIDIN juga mengatakan bahawa ASAR NAWI membawa barang-barang keperluan sehari-hari untuk WONDAR yang telah disusun dalam di dalam bot. Bahan-bahan tersebut sama sekali tidak saya ketahui apa isinya karena di dalam guni, SIDIN juga menyuruh saya menelpon HUSIN SITORUS agar bot tersebut berhenti sebentar.

(10) Akhirnya saya bersama ASAR NAWI dengan menggunakan bot lain berangkat untuk menjumpai HUSIN SITORUS, setelah ketemu saya melihat HUSIN SITORUS berada di ruangan kemudi bot kemudian saya mengatakan kepada HUSIN SITORUS bahwa ada seorang laki-laki titipan SIDIN yang bernama ASAR NAWI untuk ikut serta ke Malaysia serta beberapa bahan untuk WONDAR. ASAR NAWI juga pandai mengemudikan bot. Kemudian ASAR NAWI meminta kepada saya untuk membantu dia memindahkan beberapa buah guni dari bot yang saya bahwa ke bot yang dibawa HUSIN SITORUS.

(11) Setelah selesai akhirnya kami berpisah, mereka menuju Malaysia dan saya kembali pulang.

(12) Untuk itu saya (AHMAD TENGKIS) berikrar dan menyatakan dengan sebenamya, bahwa ASAR NAWI lah yang membawa guni-guni tersebut, berikut menyatakan dengan sebenamya BUKAN HUSIN SITORUS yang membawa guna-guni tersebut.

(13) Bahwa benar HUSIN SITORUS adalah orang yang diminta jasa oleh SIDIN dengan upah senilai Rp1,200.000 (Satu juta Dua Ratus Ribu Rupiah) untuk membawa indomie dan 2 (dua) orang Suku Aceh untuk menjumpai WONDAR.

(14) Saya tidak bisa hadir sebagai saksi di Mahkamah Malaysia karena saya merasa takut tertuduh terlibat membawa Indomie dan 2 (dua) orang laki-laki suku Aceh warga negara Indonesia masuk ke Malaysia secara illegal.

Demikianlah surat pernyataan ini saya buat dengan sebenar-benarnya dan sesuai dengan sepengetahuan saya dengan fikiran sehat dan tanpa ada paksaan dari orang lain.

Diketahui oleh:

Kepala Bagian Hukum

SETDAKAB BATU BARA

t.t.

H. ZULHENDRI. SH

NIP. 400038018

BATU BARA, 21 April 2009

Hormat saya,

t.t.

AHMAD (AHMAD TINGKIS)

Diketahui oleh:

Bagian Konsuler Malaysia Medan

t.t.

MOHD. TARMIZI BIN MOHD. TAIB

22 APR 2009

Rp. 16,000

Rept No. EV573733

[6] We note that the above affidavit was sworned by the deponent before Consulate General of Malaysia in Medan, Indonesia.

[7] The learned trial judge upon evaluation of the abovementioned defence decided to dismiss it and summarised his reasons for so doing as follows:

> This court found this testimony of the OKT to be rather incredible to be believed because having had travelled for 17 hours from Batu Bara to Pulau Indah to allegedly meet Wondar to deliver the two men and the goods, the OKT could only wait for about ten minutes before deciding to leave and head back to Indonesia. Unless of course, the OKT had to leave in such a huff because he knew what he was carrying in his boat all the way from Indonesia. To my mind, under the circumstances of this case, such conclusion cannot be dismissed as being far-fetched and indeed that it was the only reasonable inference to be arrived at.
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> As could be recalled, apart from his own testimony, the defence had put in two affidavits affirmed by two persons in Sumatra whose names he had mentioned in the course of his evidence. From the perusal of the two affidavits they had not thrown any light on the drugs contained in the gunny sacks. The affidavits affirmed by Ahmad Tengkis only went to the extent that he was told by Asar Nawi that the gunny sacks contained 'barang keperluan seharian' which were to be handed over to one by the name of Wondar upon arrival in Klang … To my mind the two affidavits so admitted in this case ought to be considered just like any other evidence. One other aspect of that consideration must necessarily be that the affidavits so admitted were not open to cross-examination by the opposing side and as such, its veracity could not be readily established … Looking at the totality of the evidence made

A available by the defence before this court, it was my finding that it has failed to rebut the presumption of possession with regard to the impugned drugs. I had found it to be rather incredible to be believed such that it had not rebutted the presumption of possession operating against him on the balance of probabilities.

B THE APPEAL

[8] Counsel for the appellant submitted to us that the trial judge in his decision has committed an error when he invoked s 37(d) of the DDA 1952 and ruled that the appellant had custody and control of the drugs in question after making an initial finding that reads:

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> Based on the above appreciation of the evidence led by the prosecution it was this court's finding that the prosecution had failed to establish at a prima facie level that this OKT had possession with the necessary mens rea over the impugned drugs.

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[9] Now, reading the above passage as they are found in the learned trial judge's grounds of judgment, it is puzzling that he had proceeded to rely on the statutory presumption of custody and control with the necessary mens rea when according to him the factual matrix of the prosecution case did not establish a prima facie case against the appellant.

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[10] If we had understood the trial judge correctly, his ground for invoking s 37(d) of the DDA 1952 were these:

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> … nevertheless it was my finding that the prosecution was still entitled to invoke in aid, the presumption of possession under s 37(d) of the DDA 1952 against the OKT. This was because as master of the boat, albeit a de facto one at that, this OKT had physical custody of the eight gunny sacks in the cargo hatch of the said boat and the said eight gunny sacks must qualify as 'anything whatsoever containing' as envisaged under that provision. As a direct consequence of that, the law had thereby presumed that the OKT knew the nature of the drugs contained in the 8 gunny sacks found in the cargo hatch of his boat.

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[11] It is also understood from the learned judge's grounds of judgment that his reasons for invoking the above statutory presumption was because the appellant at the time of the raid was undisputedly seen in the wheelhouse helming the boat while three other men who were also in the wheelhouse were found asleep. Apparently, with this scenario the learned trial judge came to a conclusion that since the appellant was the one who helmed the boat, it should therefore be inferred that he had custody and control of whatever were found in the boat including the eight gunny sacks found in the cargo hatch. This, further led the judge to invoke s 37(d) of the DDA 1952 to impute knowledge of the contents and nature of the goods in question.

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[12] With regard to the above, with respect to the learned trial judge we would like to emphasise that before invoking the presumption under s 37(d), the vital question for the court to determine is whether the prosecution has made out a prima facie case of possession of the drugs in question as understood in criminal law. And possession here means having custody and control combined with evidential or criminal proof of actual knowledge or circumstances clearly and irresistibly pointing to knowledge of the drugs.

[13] Possession through having control and custody in order to incriminate a person, must be such that the possessor must know the nature of the thing possessed. Having exclusive custody and control implies and involves having knowledge both of the drugs and the nature thereof. For the purpose of criminal liability, without exclusive custody and control of the drugs, the mere fact that the accused had knowledge thereof is insufficient to incriminate – (*Public Prosecutor v Basri bin Salihin* [1994] 2 MLJ 476), *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632).

[14] Reverting back to the case on appeal before us, the eight gunny sacks were found in the cargo hatch, which in all likelihood was located somewhere away from the wheelhouse. There seemed to be no evidence from the prosecution to suggest that the cargo hatch was under lock and key, not accessible to anyone else except the appellant.

[15] There is a welter of authoritative precedents which have held that for possession to be established, accessibility by others to the place where the drugs are found should be excluded by evidence by the prosecution (*Pendakwa Raya v Kang Ho Soh* [1992] 1 MLJ 360; [1991] 3 CLJ 2914, *Public Prosecutor v Tang Chew Weng* [1969] 2 MLJ 17). The onus is not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility and the issue must be answered in favour of the appellant if there were more than one way in which the evidence adduced by the prosecution might be viewed such as in the present case, implicating the appellant or the other persons who were present in the boat. (*Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). In other words exclusivity of custody and control of the drugs ought to be established by the prosecution.

[16] In *Choo Yoke Choy v Public Prosecutor*, the Supreme Court held that 'the prosecution has to establish beyond reasonable doubt that the appellant alone had possession of the drugs'.

[17] In our present case, from the nature of the evidence led, we have no difficulty to conclude that the prosecution has failed to make out a prima facie case of exclusive custody and/or control of the eight gunny sacks containing the drugs in question, against the appellant.

[18] One other issue raised by counsel for the appellant, is the non-calling of the people who were present in the boat at the time of the raid.

[19] It is noted that the three other persons found sleeping inside the wheelhouse at the time of the raid were not called to testify for the prosecution, neither were they offered to the defence. According to the prosecution, these men were released subsequently. This state of affairs has given rise to submission by the appellant's counsel that the failure by the prosecution to procure the presence and attendance of these men who would have been potential witnesses in the trial should lead to some adverse inference be drawn against the prosecution under s 114(g) of the Evidence Act 1950.

[20] In response to this issue, the learned trial judge had this to say:

> To my mind, two important conclusions could be derived from that situation. One is that the fact that these three men were actually sleeping was accepted by reason of non challenge and secondly, as there was no challenge to such factual assertion, there was therefore no necessity for the prosecution to call any of these three persons to rebut anything as nothing coming from the defence that needed to be rebutted pertaining to that specific factual assertion by both SP3 and SP4.

[21] With respect we are in total disagreement with the aforementioned supposition made by the learned trial judge. Although the three men were asleep at the time when SP3 and SP4 boarded the boat, surely they would be able to throw some light as to what had transpired and took place or what they had observed before starting their journey at Batu Bara. Logically, these three men could not be sleeping throughout their 17 hours journey to Port Klang. They should be able to tell the court about what had taken place during the early part of their journey.

[22] In the circumstances of the case, we are of the firm view that the failure of the prosecution to call these witnesses or at the very least offering them to the defence has caused grave injustice to the appellant. It is trite law that where circumstantial evidence points to two or more inferences, it should be resolved by exercising the more favourable inference to the accused (*Phoon Liat Sum v Public Prosecutor* [1950] MLJ 205).

[23] In our case here it is manifestly evident that the learned trial judge based the conviction solely by inference from the evidence. In this regard, the caution stated by the Supreme Court in *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423 should be borne in mind. The Supreme Court stated at p 481:

> … we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference done is not sufficient to support a conviction of the appellant …

[24] In fact we would further add that by the nature of the evidence put to the fore by the prosecution, defence should not have been called for the reasons aforementioned. Hence we decided as we did.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed